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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10

11 LESLIE SCOTT BARRON,

12 Plaintiff,

13 v.

14 CAROLYN W. COLVIN, Acting
15 Commissioner of Social Security,

16 Defendant.
17

Case No. ED CV 16-00794 AFM

**MEMORANDUM OPINION AND
ORDER AFFIRMING DECISION
OF COMMISSIONER**

18
19 **I.**

20 **BACKGROUND**

21 Plaintiff Leslie Scott Barron filed his application for disability benefits under
22 Title II of the Social Security Act and Supplemental Security Income under Title
23 XVI of the Social Security Act on September 27, 2010. After denial on initial
24 review of an Administrative Law Judge's decision dated July 26, 2013¹, the
25 Appeals Council remanded the matter, and a hearing took place before a different
26

27 ¹ That Administrative Law Judge had previously found Plaintiff not disabled in a
28 decision dated September 12, 2012, which was appealed and remanded by the
Appeals Council.

1 Administrative Law Judge (ALJ) on November 24, 2014. In a decision dated
 2 January 15, 2015, the ALJ found that Plaintiff was not disabled within the meaning
 3 of the Social Security Act for the period from September 12, 2010 through the date
 4 of the decision. The Appeals Council declined to set aside the ALJ's unfavorable
 5 decision in a notice dated February 26, 2016. Plaintiff filed the Complaint herein
 6 on April 25, 2016, seeking review of the Commissioner's denial of his application
 7 for benefits.

8 In accordance with the Court's Order Re: Procedures in Social Security
 9 Appeal, Plaintiff filed a memorandum in support of the complaint on November 14,
 10 2016 ("Pl. Mem."), and the Commissioner filed a memorandum in support of her
 11 answer on January 4, 2017 ("Def. Mem."). Plaintiff did not file a reply. This
 12 matter now is ready for decision.²

13 II.

14 DISPUTED ISSUES

15 As reflected in the parties' memoranda, the disputed issues are as follows:

- 16 (1) Whether the ALJ erred in reliance on the testimony of the vocational
 17 expert ("VE") in determining Plaintiff could perform other work.
- 18 2) Whether the ALJ's residual functional capacity findings are
 19 incomplete.

20 III.

21 STANDARD OF REVIEW

22 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's decision to
 23 determine whether the Commissioner's findings are supported by substantial
 24 evidence and whether the proper legal standards were applied. *See Treichler v.*
 25 *Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1098 (9th Cir. 2014). Substantial
 26 evidence means "more than a mere scintilla" but less than a preponderance. *See*

27 ² The decision in this case is being made based on the pleadings, the
 28 administrative record ("AR"), the parties' memoranda in support of their pleadings.

1 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Lingenfelter v. Astrue*, 504 F.3d
2 1028, 1035 (9th Cir. 2007). Substantial evidence is “such relevant evidence as a
3 reasonable mind might accept as adequate to support a conclusion.” *Richardson*,
4 402 U.S. at 401. This Court must review the record as a whole, weighing both the
5 evidence that supports and the evidence that detracts from the Commissioner’s
6 conclusion. *Lingenfelter*, 504 F.3d at 1035. Where evidence is susceptible of more
7 than one rational interpretation, the Commissioner’s decision must be upheld. *See*
8 *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007).

9 IV.

10 FIVE-STEP EVALUATION PROCESS

11 The Commissioner (or ALJ) follows a five-step sequential evaluation process
12 in assessing whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920;
13 *Lester v. Chater*, 81 F.3d 821, 828 n.5 (9th Cir. 1995), *as amended* April 9, 1996.
14 In the first step, the Commissioner must determine whether the claimant is
15 currently engaged in substantial gainful activity; if so, the claimant is not disabled
16 and the claim is denied. *Id.* If the claimant is not currently engaged in substantial
17 gainful activity, the second step requires the Commissioner to determine whether
18 the claimant has a “severe” impairment or combination of impairments significantly
19 limiting his ability to do basic work activities; if not, a finding of nondisability is
20 made and the claim is denied. *Id.* If the claimant has a “severe” impairment or
21 combination of impairments, the third step requires the Commissioner to determine
22 whether the impairment or combination of impairments meets or equals an
23 impairment in the Listing of Impairments (“Listing”) set forth at 20 C.F.R. part
24 404, subpart P, appendix 1; if so, disability is conclusively presumed and benefits
25 are awarded. *Id.* If the claimant’s impairment or combination of impairments does
26 not meet or equal an impairment in the Listing, the fourth step requires the
27 Commissioner to determine whether the claimant has sufficient “residual functional
28 capacity” to perform his past work; if so, the claimant is not disabled and the claim

1 is denied. *Id.* The claimant has the burden of proving that he is unable to perform
2 past relevant work. *Drouin v. Sullivan*, 966 F.2d 1255, 1257 (9th Cir. 1992). If the
3 claimant meets this burden, a *prima facie* case of disability is established. *Id.* The
4 Commissioner then bears the burden of establishing that the claimant is not
5 disabled, because he can perform other substantial gainful work available in the
6 national economy. *Id.* The determination of this issue comprises the fifth and final
7 step in the sequential analysis. 20 C.F.R. §§ 404.1520, 416.920; *Lester*, 81 F.3d at
8 828 n.5; *Drouin*, 966 F.2d at 1257.

9 V.

10 THE ALJ'S APPLICATION OF THE FIVE-STEP PROCESS

11 At step one, the ALJ found that Plaintiff had not engaged in substantial
12 gainful activity since September 12, 2010, the alleged onset date. (AR 24.) At step
13 two, the ALJ found that Plaintiff has the following severe impairments: diabetes
14 mellitus; obesity; carpal tunnel syndrome; degenerative disc disease of the cervical
15 and lumbar spine; obstructive sleep apnea; hypertension; and gastroesophageal
16 reflux disease. (*Id.*) At step three, the ALJ found that Plaintiff does not have an
17 impairment or combination of impairments that meets or medically equals the
18 severity of one of the listed impairments. (AR 28.) At step four, the ALJ found
19 that Plaintiff has the residual functional capacity ("RFC") to perform light work as
20 defined in 20 C.F.R. §§ 404.1567(a) and 416.967(b) except:

21 [Plaintiff] can occasionally use foot controls; can occasionally perform
22 postural activities; but cannot climb ladders, ropes, or scaffolds; should
23 avoid hazards; should avoid concentrated exposure to extremes of
24 temperature or vibration; can perform occasional pushing or pulling
25 with the bilateral upper extremities; can perform occasional overhead
26 reaching with the right upper extremity and cannot reach above
27 shoulder level with the left upper extremity, otherwise limited to
28 frequent reaching in all other directions as well as frequent

manipulation; should avoid extremes of neck motion; requires a cane for ambulation; requires a sit-stand option based upon his testimony of the need to stand or walk for about 10 to 15 minutes after sitting for about 20 minutes, as well as the need to sit for about 10 to 15 minutes after standing or walking for about 10 to 15 minutes; and limited to unskilled work secondary to pain. (AR 28.)

Finally, at step five, based on the VE's testimony, the ALJ concluded that Plaintiff could not perform his past relevant work, but based on Plaintiff's age, education, work experience, and residual functional capacity, there are jobs that exist in significant numbers in the national economy (information clerk, small products assembler and counter clerk) that Plaintiff can perform. (AR 40-41.) Accordingly, the ALJ concluded that Plaintiff was not disabled as defined by the Social Security Act from September 12, 2010 through the date of the decision. (AR 41.)

VI.

DISCUSSION

Issue 1: The ALJ's reliance on testimony of the VE.

At step five of the sequential evaluation process, "the burden shifts to the Commissioner to demonstrate that the claimant is not disabled and can engage in work that exists in significant numbers in the national economy." *Hill v. Astrue*, 698 F.3d 1153, 1161 (9th Cir. 2012); *see also* 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). The Dictionary of Occupational Titles ("DOT") is the Commissioner's "primary source of reliable job information" and creates a rebuttal presumption as to a job classification. *See Johnson v. Shalala*, 60 F.3d 1428, 1434 n.6, 1435 (9th Cir. 1995); *see also Tommasetti v. Astrue*, 533 F.3d 1035, 1042 (9th Cir. 2008). Where, as here, the testimony of a VE is used at step five, the VE must identify a specific job or jobs in the national economy having requirements that the claimant's physical and mental abilities and vocational qualifications would satisfy.

1 *See Osenbrock v. Apfel*, 240 F.3d 1157, 1162-63 (9th Cir. 2001); *Burkhart v.*
2 *Bowen*, 856 F.2d 1335, 1340 n.3 (9th Cir. 1988); 20 C.F.R. §§ 404.1566(b),
3 416.966(b).

4 In the present case, the dispute focuses on the restriction in the RFC of the
5 need to alternate between sitting and standing approximately every 10 to 20
6 minutes³, referred to as a “sit/stand option.” Plaintiff contends that the sit/stand
7 option in the RFC conflicts with the DOT description for the jobs of information
8 clerk, small products assembler, and counter clerk and that the ALJ erred by not
9 eliciting a reasonable explanation from the VE for the deviation under Social
10 Security Ruling (SSR) 00-4p. The Commissioner, in response, argues that there is
11 no conflict with the DOT because the DOT is silent on this “sit/stand option” and
12 that the ALJ satisfied SSR 00-4p by verifying that with the VE that there was no
13 conflict with the DOT. For the reasons set forth below, the Court finds that the ALJ
14 did not err in his reliance on the VE.

15 The ALJ here asked the VE whether a person with the limitations of the
16 RFC, including the sit/stand option, could perform work in the national economy.
17 In response, the VE testified that the hypothetical individual could perform the jobs
18 of an information clerk (DOT 237.367-018), small products assembler (DOT
19 706.684-022), and counter clerk (DOT 249.366-010). (AR 81-83.) The VE
20 testified that there would be no erosion to the job numbers if the person needed to
21 use a cane. (AR 82-83.) And when asked if there were “conflicts with the DOT,”
22 the VE testified “No.” (AR 83.) Relying on the VE’s testimony, the ALJ found
23 that Plaintiff could perform a significant number of jobs in the national economy
24 and was not disabled. (AR 40-41.)

25
26 ³ The RFC states: “he requires a sit-stand option based upon his testimony of the
27 need to stand or walk for about 10 to 15 minutes after sitting for about 20 minutes,
28 as well as the need to sit for about 10 to 15 minutes after standing or walking for 10
to 15 minutes” (AR 28.)

1 Under Ninth Circuit law interpreting SSR 00-4p, an ALJ (i) must ask a VE if
2 the evidence he or she is providing is consistent with the DOT and (ii) must “obtain
3 a reasonable explanation for any apparent conflict.” *See Massachi v. Astrue*, 486
4 F.3d 1149, 1152-53 (9th Cir. 2007). In the present case, the ALJ complied with the
5 first requirement by asking the VE whether there were any conflicts with the DOT
6 and receiving the VE’s answer that there were none. Plaintiff agrees that the DOT
7 descriptions do not expressly address the need for the sit/stand option. (*See Pl.*
8 *Mem.* at 7 (“The DOT does not discuss the availability of an option to alternate
9 positions.”).) Plaintiff nevertheless contends that the ALJ was required to obtain a
10 reasonable explanation of an apparent conflict between the VE’s opinion and the
11 DOT. Thus, the issue is whether a conflict existed that required an explanation
12 from the VE — despite the DOT’s silence on the sit/stand option.

13 The recent Ninth Circuit decision in *Gutierrez v. Colvin*, 844 F.3d 804 (9th
14 Cir. 2016), discussed the approach for determining whether a conflict exists
15 between VE testimony and the DOT: “For a difference between an expert’s
16 testimony and the [DOT’s] listings to be fairly characterized as a conflict, it must be
17 obvious or apparent. This means that the testimony must be at odds with the
18 [DOT’s] listing of job requirements that are essential, integral or expected. . . .
19 [W]here the job itself is a familiar one — like cashiering — less scrutiny by the ALJ
20 is required.” *Id.* at 808. In *Gutierrez*, the DOT description for a cashier stated that
21 the job required frequent reaching, but the RFC did not permit lifting of the right
22 arm above shoulder. In holding that there was no apparent or obvious conflict, the
23 Ninth Circuit looked at the type of duties listed in the DOT description, applied
24 common knowledge regarding the normal work of a cashier, and concluded that the
25 typical cashier did not need to reach overhead frequently: “[A]n ALJ must ask
26 follow up questions of a vocational expert when the expert’s testimony is either
27 obviously or apparently contrary to the [DOT], but the obligation doesn’t extend to
28 unlikely situation or circumstances. . . . Given how uncommon it is for most

1 cashiers to have to reach overhead, we conclude that there was no apparent or
2 obvious conflict between the expert's testimony and the [DOT]." *Id.*

3 *Gutierrez*, however, did not address whether the DOT's silence on a sit/stand
4 option is in obvious or apparent conflict with a VE's testimony that a person
5 requiring a sit/stand option can perform a particular job. Indeed, there is no
6 controlling Ninth Circuit authority on this question, although a number of
7 unpublished decisions have addressed it. *See Manley v. Colvin*, 2016 WL 7191541
8 at *3-4 (C.D. Cal. Dec. 12, 2016) (discussing cases). For example, *Dewey v.*
9 *Colvin*, 650 Fed. Appx. 512 (9th Cir. 2016), recently held that there was no conflict
10 where the DOT was silent on whether the particular jobs in question allowed for a
11 sit/stand option and the testimony of the VE indicated that claimant (who required a
12 sit/stand option) could perform those jobs.

13 Here, the Court likewise concludes that there is not an apparent or obvious
14 conflict between the pertinent DOT descriptions and the requirement that Plaintiff
15 needs to stand or stretch at least ten percent of the day. The duties of an
16 information clerk (DOT 237.367-018) include providing travel information,
17 answering questions, describing routes and services, and quoting trip rates and
18 discounts. *See* 1991 WL 672187. In the language of *Gutierrez*, the "essential,
19 integral or expected" requirements of this job would not prevent the required
20 alternating sit/stand option. The same is true for small products assembler (DOT
21 706.684-022)⁴ and counter clerk (DOT 249.366-010)⁵. The essential, integral or
22 expected requirements of these job duties do not prevent Plaintiff from changing his
23 sitting and standing as needed. It would be a very unlikely or uncommon

24 ⁴ The duties of small products assembler include repetitive tasks on an assembly
25 line to mass produce small products and preparing machines to perform fastening,
26 fitting or cutting operations. *See* 1991 WL 679050.

27 ⁵ The duties of counter clerk include receiving film for processing, loading film
28 into processing equipment, collecting payments, answering customer questions,
filing film, using a cash register, and selling photo supplies. *See* 1991 WL 672323.

1 circumstance where an information clerk, small parts assembler or counter clerk
2 could not alternate between standing and sitting as required in the RFC.⁶

3 Finally, the Court finds persuasive the reasoning of *Laufenberg v. Colvin*,
4 2016 WL 6989756 at *9 (C.D. Cal. Nov. 29, 2016), that to hold a conflict exists in
5 circumstances such as these “would mean that VEs always create conflicts with the
6 DOT whenever they mention any of the multitude of things about a job not
7 expressly addressed in the DOT.” No controlling authority requires a finding of
8 that type of conflict.

9 In sum, the Court concludes that there was not an obvious or apparent
10 conflict between the VE’s testimony and the DOT descriptions for information
11 clerk, small products assembler and counter clerk. Accordingly, the ALJ was not
12 required to ask the VE to provide an explanation of any deviation from the DOT,
13 and there was no error in the ALJ’s reliance on the VE’s testimony in making the
14 step five determination of other work that Plaintiff could perform.

15 **Issue 2: Alleged ambiguity in the RFC.**

16 Plaintiff contends that the ALJ’s RFC finding is ambiguous and incomplete
17 because the RFC does not the state the total amount of standing and walking that
18 the Plaintiff could do in an 8-hour day. The Court disagrees. The ALJ’s RFC
19 provides that Plaintiff has the capacity “to perform light work” (AR 28.) The
20 parties agree that the definition of light work applies over an 8-hour workday. (*See*
21 Pl. Mem. at n.3, citing SSR 83-10; Def. Mem. at 8.) Under the applicable Social
22 Security Ruling, light work requires “a good deal of walking or standing [and]
23 requires being on one’s feet up to two-thirds of a workday.” SSR 83-10. The
24 Ruling further states that the “full range of light work requires standing or walking,
25 off and on, for a total of approximately 6 hours of an 8 hour workday.” (*Id.*) The
26 RFC here provides certain limits to the light work capacity (so that it is not at the

27 ⁶ The Court also notes that occupations in question are relatively familiar jobs,
28 thereby requiring less scrutiny by the ALJ. *See Gutierrez*, 844 F.3d at 807.

1 “full range”), including that of sitting for 10 to 15 minutes after standing or walking
2 for 10 to 15 minutes. Within the range of that sit/stand option, a person could sit
3 for 10 minutes after every 15 minutes of standing or walking. Put otherwise, there
4 could be approximately 33% sitting and 66% standing or walking over an 8-hour
5 day. That meets the requirement of a “good deal of standing or walking” and
6 would be distinguished from sedentary jobs “performed primarily in a seated
7 position” SSR 83-10. The ALJ accurately and unambiguously recited these
8 limitations — which came from Plaintiff’s standing and walking capabilities — in
9 the RFC and in the questions to the VE, and the VE’s testimony identified three
10 occupations that a person could do under those limitations based on descriptions in
11 the DOT. That was not error.

12 * * * *

13 IT THEREFORE IS ORDERED that Judgment be entered affirming the
14 decision of the Commissioner and dismissing this action with prejudice.

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16 DATED: January 31, 2017



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18 ALEXANDER F. MacKINNON
19 UNITED STATES MAGISTRATE JUDGE
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